AHMAD ABDUL & ORS.

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, ALOR SETAR
LIM BENG CHOON J
[CRIMINAL APPEAL NO. 123 OF 1984]
13 DECEMBER 1986

CRIMINAL LAW AND PROCEDURE: *Robbery using firearms - All four accused convicted and sentenced to life imprisonment - Appeal - Extent of power of appellate Court to interfere with decisions of lower Court - Admissibility of cautioned statements - Identification evidence - Offence of abetment - Defence of alibi - Power of Court to alter conviction imposed by lower Court and substitute a new one - Firearms (Increased Penalties) Act 1971 - Sections 4, 9.*

This was a criminal appeal against conviction and sentence imposed by the learned President of the Sessions Court.

On 7 April 1981 there was a robbery at Kampong Air Hitam, in the District of Kubang Pasu, Kedah, and a couple PW1 and PW2 were robbed of some jewellery and cash. The 1st appellant was arrested and charged under s. 4 of the Firearms (Increased Penalties) Act 1971 ("the Act") while the 2nd, 3rd and 4th appellants were charged under s. 109 of the Penal Code and s. 4 of the Act.

All the four accused were convicted and sentenced to life imprisonment together with 6 strokes of the rotan. Each of the accused appealed against the conviction and sentence. They contended, *inter alia*, that the respective sentences imposed on them were wrong in law.

Held:

[1] The appellate Court should always give due consideration to the findings of facts by a Magistrate or a President of the trial Court when such findings are based on the advantage of seeing and testing the credibility of the witnesses by him. The appellate Court would only interfere if it is convinced that the decision of the trial Court is wrong in that the Magistrate or the President had misdirected himself and consequently any advantage enjoyed by reason of his having seen or heard the witnesses would not be sufficient to explain or justify his decision.

[2] The 1st appellant's story as to inducement and threat was highly incredible. There was sufficient independent corroborative evidence to support the confession made by the 1st appellant. The revolver had been positively identified, and the decision of the President in convicting the appellant was neither improper nor wrong in law.

[3] In the circumstances, the sentence was upheld since there is only one sentence under section 4 of the Act, i.e. life imprisonment with whipping of not less than 6 strokes of the rotan.

[4] Regarding the 2nd, 3rd and 4th appellants and their identification by PW2, the learned President did not only rely on the demeanour and credit-worthiness of PW2. He also took into consideration all the circumstances in which the identification of the three appellants by PW2 came to made. Despite one or two inaccuracies in the evidence of PW2, the finding of the learned President regarding the identification of the three appellants by PW2 was upheld.

[5] The learned President did not misdirect himself on point of law in his finding that the caution statements of the 3rd and 4th appellants respectively were made voluntarily and properly admitted and formed part of the evidence of the prosecution.

[6] There being no evidence of abetment the learned President had erred in law and in fact in convicting the three appellants for the offence with which they were charged.

[7] Failure to give notice under s. 402A of the Criminal Procedure Code as to the defence to alibi was fatal and the evidence relating to the defence of alibi could not be taken into consideration.

[8] The High Court in exercising its appellate jurisdiction is empowered under s. 316(b) of Criminal Procedure Code to alter a finding and to substitute a conviction for a different offence but in hearing an appeal from a conviction, this power must be exercised subject to the provisions of ss. 166 and 167 of the Criminal Procedure Code and that, to warrant a substitution there must be clear evidence that a case for the substituted offence had been made out or established in the Court below. This was an appropriate case to warrant a substitution of conviction. Accordingly the convictions of the 2nd, 3rd and 4th appellants were substituted with a conviction for the commission of an offence of robbery under the second limb of s. 392 of the Penal Code and they were each sentenced to 12 years' imprisonment. In addition the 2nd an 4th appellants were to be given 6 strokes of the rotan.

[Conviction and sentence of 1st appellant upheld. Conviction and sentence of 2nd, 3rd and 4th appellants substituted.]

Cases referred to:

Antonio Dias Caldeira v. Frederick Augustus Gray [1936] MLJ 137
Dato Mokhtar bin Hashim v. Public Prosecutor [1983] CLJ (Rep) 101
Lee Sang Cheah v. Rex [1946] MLJ 22
Lim Kheak Teong v. PP [1984] 1 CLJ (Rep) 207
Herchun Singh & Ors. v. PP [1969] 2 MLJ 209
Hem Raj v. State of Amjer [1954] AIR SC 462
Yap Sow Keong v. PP [1947] 1 MU 90
PP v. Lai Pong Yuen & Ors. [1968] 1 MLJ 12
Johnson Tan Han Seng v. PP [1977] 2 MLJ 67
Subramaniam Goudan v. Madras State [1958] AIR SC 66
Rex v. Sullivan [1887] 16 Cox Cr Law Cas 347
Sambu v. Rex [1947] MLJ 16
K.S. Roberts v. PP [1970] 2 MLJ 137
R v. Turnbull [1976] 3 All ER 549
R v. Long [1974] 57 Cr App Rep 871
Khoo Chye Hin v. PP [1961] MLJ 105
Tan Chee Man v. PP [1977] 2 MLJ 247
Sesha Aiyar v. Venkatasubba Chetty [1924] AIR Madras 487
PP v. Mirza Khan [1947] 13 MLJ 49
Chuan Keat Chan Ltd. & Anor. v. PP [1972] 2 MLJ 57
Rupdivi v. State of HP [1955] AIR HP 15
PP v. Lim Chen Len [1981] 2 MLJ 41
Yong Hock Pin v. PP [1977] 1 MLJ 178
Sivalingam v. PP [1982] 2 MLJ 172
Ng Ee v. PP [1941] MLJ 180
Lew Cheok Hin v. Reg. [1956] MLJ 131

Legislation referred to:
Criminal Procedure Code, ss. 13, 113, 165, 166, 167, 170, 286, 316(b), 402A, 422
Evidence Act 1950, ss. 30, 133
Firearms (Increase Penalties) Act 1971, ss. 3A, 4
Penal Code, ss. 34, 40, 109, 392, 397
Public Order and Safety Proclamation, ss. 3(1), 6

For 1st, 2nd & 3rd appellants - Manjit Singh; M/s. Manjit Singh & Co.
For 4th appellant - George John; M/s. George John & Co.
For Public Prosecutor - Zulkifli bin Abu Bakar, Deputy Public Prosecutor

JUDGMENT

Lim Beng Choon J:

In the Alor Setar Sessions Court Arrest Case No. 59/82 the charges against the accused Ahmad bin Abdul was:

> That you on 7 April 1981 at about 2.00 a.m. at Kampung Air Hitam, in the District of Kubang Pasu, in the State of Kedah, committed an offence of robbery and at the time of committing the said offence you exhibited a firearm, to wit, a home-made revolver, in the manner likely to put any person in fear of death or hurt and that you have thereby committed an offence punishable under s. 4 of the Firearms (Increased Penalties) Act 1971, (Act 37 of Laws of Malaysia).

In the Alor Setar Sessions Court Arrest Case No. 60/82 the 3 accused namely Shamsuddin bin Musa, Wan Teh bin Wan Daud and Md. Isa @ Awang bin Noh were jointly charged as follows:

> That you jointly on 7 April 1981 at about 2.00 a.m. at Kampong Air Hitam, in the District of Kubang Pasu, in the State of Kedah abetted the commission of the offence of robbery by one **Ahmad bin Abdul** and at the time of committing the said offence, the said **Ahmad bin Abdul** exhibited a firearm, to wit, a home-made revolver bearing No. 728327, in the manner likely to put any person in fear of death or hurt, which offence was committed in consequence of your abetment, and that you have thereby committed an offence punishable under s. 109 of the Penal Code, and s. 4 of Firearms (Increased Penalties) Act 1971 (Act, 37 of Laws of Malaysia).

On 24 August 1982 when the Sessions Court Alor Setar Arrest Case No. 60/82 came up for mention at the Sessions Court, the prosecuting officer applied to the learned President for a joint trial of that case with the Sessions Court Alor Setar Arrest Case No. 59/82. The learned President allowed the application and fixed the hearing of the two cases from 25-27th October 1982. There were, however, a number of postponements and the joint trial was not heard until 25 October 1983. It is surprising to note that it was not until 25 May 1984 that the hearing of the trial was completed when from the record of appeal, the whole proceeding should not have taken more than a month to complete. In view of the lengthy duration of the trial it may not be out of place for me to touch on this disturbing feature of the trial which in my view was due to the fact that the prosecution was not able to produce the necessary exhibit at the time it was supposed to be produced. The delay was also compounded by the fact that some of the essential prosecution witnesses were not available. There was also an unexplained adjournment of the hearing from 3 November 1983 to 21 January 1984. It is true that justice should not be rushed but again one must remember that undue delay in a criminal trial may defeat the maxim that justice is truth in action. However that may be, at the end of the trial all the 4 accused persons were duly convicted and each of the accused was sentenced to life imprisonment with 6 strokes of the rotan. In the

consequence each of the accused appealed to this Court against the conviction and the sentence. Their appeals were consolidated and jointly heard by this Court. There are six grounds in the petition of appeal of the 1st appellant and some of them are overlapping but his main grievances are:

1. that the learned President erred in law when he admitted the cautioned statement of the 1st appellant in spite of the allegation made by him that the statement was made under duress;

2. that the learned President erred in law and in fact when he held that the revolver exhibited at the time of the robbery was the one and same produced by the prosecution at the trial as Exhibit P3 when there was no positive identification of the said revolver;

3. that the learned President should have borne in mind that it was unsafe to convict the 1st appellant when such conviction was based solely on his cautioned statement;

4. finally the learned President had misdirected himself in law by failing to take into sufficient consideration his defence of alibi.

There are also several grounds in the petitions of appeal of the 2nd, 3rd and 4th appellants and likewise some of them are overlapping and one ground was abandoned but their main complaints however are that:

(i) the learned President had misdirected himself in law in the conviction of the 3 appellants solely on the identification made by PW2 who was one of the victims of the robbery particularly when the evidence of identification was weak;

(ii) the learned President depended solely on his observation of the demeanour of PW2 to arrive at his conclusion that the identification evidence of PW2 was unblemished;

(iii) the learned President erred in law when he convicted the 3 appellants under s. 4 of the Firearms (Increased Penalties) Act 1971 when there was no evidence that any of the 3 appellants exhibited any firearms in the course of the robbery;

(iv) the learned President was wrong in law in admitting the respective cautioned statements of the 3rd and 4th appellants.

All the 4 appellants also contended that the respective sentences imposed on them were wrong in law.

Before I proceed to consider the grounds of appeal of each of the appellants it is necessary at the outset for me to consider the extent of the power of an appellate Court to interfere with the decision of a lower Court. In this connection some guidance can be obtained from several Malaysian authorities. However I need only to cite 3 authorities which to my mind would give sufficient guidelines as to my power to interfere with the decision of the learned President. The first case is *Antonio Dias Caldeira v. Frederick Augustus Gray* [1936] MLJ 137 and the following passage in the judgment of that case is relevant:

> In an appeal from the decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

This case was referred to and considered by the Federal Court in *Dato Mokhtar bin Hashim v. Public Prosecutor* [1983] CLJ (Rep) 101. The second case which I would like to refer to is *Lee Sang Cheah v. Rex* [1946] MLJ 22 and the relevant passage to illustrate the power of the appellate Court appears at p. 23 which says:

> There was unquestionably evidence to support this conviction, and the Magistrate who saw and heard the witnesses believed that evidence. Such a conviction should not be set aside unless there is shewn to have been some grave error or that it is against the weight of evidence, and in the present case it is only weight of evidence that need be considered.

A more recent case illustrating the power of the appellate Court is *Lim Kheak Teong v. PP* [1984] 1 CLJ (Rep) 207. In that case the Federal Court has this to say regarding the power of the appellate Court (see p. 209):

> Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion.

The principle that emerges from these authorities to put it simply is as follows. The appellate Court should always give due consideration to the findings of facts by a Magistrate or President a Sessions Court when such findings are based on the advantage of seeing and testing the credibility of the witnesses by him. The appellate Court would only interfere if it is convinced that the decision of the lower Court is wrong in that the Magistrate or the President had misdirected himself and consequently any advantage enjoyed by reason of his having seen or heard the witnesses would not be sufficient to explain or justify his decision.

There is no doubt in the two cases heard jointly by the Sessions Court that a robbery did in fact take place at the date, time and place referred to in the respective charges. There is also no doubt that as a consequence of the robbery the complainant, PW1 and his wife, PW2, were robbed of some jewellery and cash.

In considering the present appeal it is appropriate for me to start with the contention of the 1st appellant regarding the admissibility of the cautioned statement made by him. There is no doubt at all that the cautioned statement appearing at p. 86 of the record of appeal is a confession as it contains a narration of the robbery and of his own participation therein and no attempt was made to negative the offence alleged to have been committed by him - *see Herchun Singh & Ors. v. PP* [1969] 2 MLJ 209. Although the learned President was satisfied that the confession was voluntarily made nevertheless it is open to this Court in the exercise of its appellate jurisdiction to interfere if the finding is being attacked on the ground that it had been reached without applying the true and relevant legal tests and consideration of relevant matters (see *Dato' Mokhtar bin Hashim v. PP (supra)* p. 273).

In the notes of evidence appearing at p. 64 of the record of appeal, I note that when the prosecution sought to tender the cautioned statement, the 1st appellant objected to its admissibility and a trial-within-a-trial was held. The recording officer in his evidence at the *voire dire* proceeding said that he had complied fully with the requirements of s. 113 of the Criminal Procedure Code before he proceeded to record the cautioned statement. He also said that no inducement, threat or promise was made by anyone to the 1st appellant when the statement was made by him. In short the 1st appellant made that statement voluntarily. On the other hand the 1st appellant in his evidence given at the *voire dire* proceeding alleged that the police forced him to make the statement stating that if he refused to do so he would be detained under the ISA for a period of 60 days. As a result of this threat he accordingly gave a statement and what he said in his statement was derived solely from "cerita" he heard from some people in a coffee shop in the kampong. Under cross-examination he conceded that the "cerita" which he heard from the coffee shop could not have revealed the names of

the participants in the robber but he claimed that he did not mention any names and it was the recording officer who took upon himself to insert the names in the statement. However that may be, it is highly incredible that what was said by the lst appellant in his statement was obtained from the rumours that were going round in the kampong coffee shop considering that the details which were given in the statement could have been known only to him and his confederates and no one else. Moreover the cautioned statement was recorded on the same day when the 1st appellant was arrested that is on 19 August 1981. In the circumstances, there is no reason for me to default the learned, President when he found as a fact that the cautioned statement was made voluntarily by the 1st appellant as there is no evidence to show that there was any inducement, threat or promise made to the 1st appellant to elicit the making of the statement by him except his bare allegation which by itself is not sufficient in law to impute duress in the making of the cautioned statement - see *Hem Raj v. State of Amjer* [1954] AIR SC 462. As regards to the truth of the contents of the cautioned statement, I can see no reason to interfere with the learned President's finding that the allegation of the lst appellant regarding his concocting his statement was incredible since what he said in his statement could only be within his own knowledge and no one else particularly when certain facts stated therein could only be known to him and not even to his confederates.

The next issue raised by the 1st appellant in this appeal that calls for serious consideration is whether the conviction of the 1st appellant based substantially, if not solely, on his confession contained in his cautioned statement, can be sustained. A study of the authorities seems to suggest that an accused can be convicted even for capital cases on his own confession. The earliest local case on this point as far as I could find is the case of *Yap Sow Keong v. PP* [1947] MLJ 90 where the principle of law on this point was unequivocably stated at p. 91:

> In our view the law as to the admissibility of retracted confession in evidence is clear, and put shortly it is that an accused person can be convicted on his own confession, even when it is retracted, if the Court is satisfied of its truth. We do not agree with those Indian decisions which lay down that before a person can be convicted on his retracted confession there must be corroborative evidence to support it.

Another authority which is illustrative of the principle is *PP v. Lai Pong Yuen & Ors.* [1968] 1 MLJ 12. In that case Ismail Khan J agreed with the principle but his Lordship inserted a caution by saying that:

> ... a confession by an accused can be used against him and if believed will lead to a conviction But the **rule of prudence requires that there should be independent corroboration.**

(Emphasis supplied)

In a more recent case of *Dato' Mokhtar bin Hashim v. PP (supra)* Hashim Yeop Sani J (as he then was) approved the proposition laid down in the *Yap Sow Keong* case *(supra)* when his Lordship said at p. 266:

> Certain Indian authorities require corroboration before a conviction can be based on the retracted confession but in *Othman & Anor. v. PP* a Federal Court decision in Singapore refused to accept the Indian authorities and adopted the view of the Malayan Union Court of Appeal in the case of *Yap Sow Keong v. PP*

However in *Johnson Tan Han Seng v. PP* [1977] 2 MLJ 67 Suffian LP (as he then was) appeared to re-affirm the rule of prudence requirement of corroborative evidence to support a confession before the confession could be used to convict the maker thereof. Thus his Lordship said at p. 72:

> If on the contrary he ruled that they were admissible, then he would have to consider the weight to be given to them in the light of the whole of the evidence.
>
> As the only evidence that the second accused knew that the first accused had a gun was contained in his statement and that of the first accused, we think that it is unsafe to allow his conviction to remain and we therefore allow his appeal, quash his conviction and set aside his sentence.

My understanding of the proposition emerging from the authorities cited above is that a conviction of an accused based solely on his retracted confession is not illegal if the circumstances of the case in question warrant it. However the rule of prudence suggests some corroboration before the conviction could be sustained if there should be a lingering doubt in the mind of the trial Judge to pronounce a verdict against the accused based solely on the confession. But what then is the nature and extent of the corroboration that is required before a conviction based on a retracted confession can be upheld? To answer this question, it is useful to reiterate that there is no absolute rule of law to prohibit a conviction of an accused based solely on his own voluntary confession and it is only a rule of prudence that calls for corroborative evidence in support of the confession before it can be used as a basis for the conviction of the maker thereof. It has also been said that the rule of prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated. The rule would be meaningless in as much as the independent evidence itself would afford sufficient basis for the conviction and it would be unnecessary to call in aid the confession. The following passage from the judgment of the Indian Supreme Court in *Subramaniam Goudan v. Madras State* [1958] AIR SC 66 1 is a good illustration of the proposition:

> But the view taken by this Court on more occasions than one is that as a matter of prudence and caution which has sanctified itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated one of the latest cases being *Balbir Singh v. State of Punjab* (S) [1957] AIR SC 216(C), but it does not necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession. In this connection it would be profitable to contrast a retracted confession with the evidence of an approver or an accomplice. Though under s. 133 of the Evidence Act a conviction is not illegal merely because it proceeds on the uncorroborated testimony of witnesses, illustration (b) to s. 114 lays down that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In the case of such a person on his own showing he is a depraved and debased individual who having taken part in the crime tried to exculpate himself and wants to fasten the liability on another. In such circumstances it is absolutely necessary that what he has deposed must be corroborated in material particulars. In contrasting this with the statement of a person making a confession who stands on a better footing, one need only to find out when there is a retraction whether the earlier statement, which was the result of remorse, repentance and contrition, was voluntary and true or not and it is with that object that corroboration is sought for. Not infrequently one is apt to fall in effor in equating a retracted confession with the evidence of an accomplice and, therefore, it is advisable to clearly understand the distinction between the two. The standards of corroboration in the two are quite different. In the case of the person confessing who has resiled from his statement, general corroboration is sufficient while an accomplice's evidence should be corroborated in material particulars. In addition the Court must feel that the reasons given for the retraction in the case of a confession are untrue.

From this authority it is clear that the nature and extent of the evidence required to corroborate a confession that is retracted is nothing more than such evidence as sufficient to support the ***general trend*** of the confession and to enable one to find out whether the earlier statement was in the circumstances of the case true or not. The judgment of *Rex v. Sullivan* [1887] 16 Cox Cri Law Case 347 regarding the truth or otherwise of a confession went to the extent of saying at p. 341 that:

> First, to consider this question governed by the rules and principles of the common law; confession of guilt made by a prisoner to any person at anymoment of time, and at any place ... are, at common law, admissible in evidence, as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true.

However, I do not think that our Courts would accept such a proposition without reservation.

With this attitude in mind I shall now consider the legality or otherwise of the conviction of the 1st appellant which was based substantially on his confession. At the outset I accept that in respect of this appeal, there should be in existence some corroborative evidence to support the confession before it could be used as a basis for the conviction and it is therefore necessary for me to examine whether the learned President had satisfied himself of the existence of such corroborative evidence.

I observe from the grounds of judgment, that the learned President made use of the cautioned statements of the 3rd and 4th appellants to corroborate the confession of the 1st Appellant (see p. 75 of the record of appeal). I am afraid the step taken by the learned President is highly improper and wrong in law. It is quite settled that when more persons than one are being tried jointly for the same offence the Court may take into consideration the confession made by one of them as against the other person pursuant to s. 30 of the Evidence Act 1950. The words "same offence" appealing in that section have been judicially defined as "identical offence". Thus in *PP v. Lai Pong Yuen (supra)* Ismail Khan J said at p. 14:

> An essential requirement of the application of s. 30 is the joint trial of the respondents for the same offence. The expression same offence means **identical** offence.
>
> (Emphasis supplied)

In the present case the offence alleged to have been committed by the 1st appellant was that in the course of committing an offence of robbery he exhibited a home-made revolver in a manner likely to put a person in fear of death or hurt thereby contravening s. 4 of the Firearms (Increased Penalties) Act 1971 and punishable under the same section. On the other hand the respective charges against the 3rd and 4th appellants was for abetting the exhibition of the said revolver by the 1st appellant and thereby contravening s. 109 of the Penal Code read with s. 4 of the Firearms (Increased Penalties) Act 1971 and punishable under the said section 4. It cannot therefore be gainsaid that the offence alleged to have been committed by the 1st appellant is not identical with, the offence with which the 3rd and 4th appellants were jointly charged. In the result therefore the, cautioned statements made by the 3rd and 4th appellants respectively should not and could not be taken into consideration as corroborative evidence of the confession of the 1st appellant. Notwithstanding this apparent error on the part of the learned President I am of the view that such an error is a mere irregularity which has not occasioned a failure ofjustice and is curable under s. 422 of the Criminal Procedure Code in view of the fact that there was sufficient independent corroborative evidence which the learned President had taken into consideration in arriving at his verdict. Reference may be made to *Sambu v. Rex* [1947] MLJ 16, in support of my view. In scrutinising the record of appeal for such independent and corroborative evidence

I note that in his cautioned statement the 1st appellant, apart from giving a detailed account of the planning of and the manner in which the robbery was carried out, admitted that after robbing PW1 and PW2, he hid the revolver which he used to keep guard over these two persons in some nipah plants behind his house and three months later he handed that revolver to his friend, Ramly bin Yunos for him to keep. This Ramly bin Yunos was called to testify as a prosecution witness, PW5. The gist of his evidence is that he was an old friend of the 1st appellant who handed him a revolver to keep "pada 4 hari raya puasa 1981" which was some time in the early part of August 1981. The evidence of PW5 was unshakened in cross-examination. Projecting the evidence of PW5 to the confession of the 1st appellant, the only logical conclusion at which any reasonable man could have arrived is that the revolver which the 1st appellant exhibited in the course of the robbery was the same revolver which he handed to PW5 to keep. The next important event was the visit by Inspector Azman bin Shahrin, PW4, and his men to the house of PW5 on 15 August 1981. As a result of the visit PW5 led PW4 and his men to a house in Kg. Padang Lalang where PW5 took the revolver from the place where it was hidden and handed it over to PW4 at the same time informing PW4 that that revolver was the same one which the 1st appellant gave to him for safekeeping "pada 4 hari raya puasa 1981". The facts leading to the recovery of the revolver from Kg. Padang Lalang was confirmed by the evidence of PW4 who at the trial also identified P3 as the same revolver that was handed to him by PW5. PW4 was able to identify P3 as the same revolver because P3 was imprinted with the No. 728327 and it was a .38 revolver. On 19 August 1981, PW4 handed the same revolver to PW9, ASP Visvanathan, a police armourer, to check on the serviceability of the revolver. PW9 in his evidence identified the revolver, Exhibit P31 as the one which PW4 handed to him on 19 August 1981 for testing. He also said that the revolver was a 38 revolver bearing No. 728327 and that it was serviceable. The cumulative effect of the evidence of PW4, PW5 and PW9 is to my mind more than sufficient to corroborate the confession of the 1st appellant of his participation in the robbery and his exhibiting the revolver, P3, in the course of the robbery. It may be recalled that one of the grounds of appeal of the 1st appellant is that the revolver exhibited at the time of the robbery was not the same one as produced in the trial Court as Exhibit P3. In developing his submission on this ground, the learned defence Counsel contended that the learned President relied substantially on the identification of P3 by PW1 and PW2 at an identification proceeding held by the police for PW1 and PW2 to identify the revolver which was used in the robbery. Since both PW1 and PW2 had no knowledge or experience about firearms, they were, so said the learned defence Counsel, in no position to identify P3. Even if I were to accept the contention of the learned defence Counsel, I cannot see how his argument could assist the 1st appellant in view of the evidence of PW4, PW5 and PW9, which strongly corroborated the confession of the 1st appellant when he said that he took part in the robbery and it was he who exhibited a .38 revolver to keep guard over PW1 and PW2 and that that very revolver was later handed over to PW5 to keep. To ensure myself that there is no mistake that P3 was the same revolver as used by the 1st appellant in the course of the robbery, I took great pains to analyse all over again the evidence adduced at the trial regarding the movements of the revolver, P3, and in the course of doing so I took notice of the following factors:

(1) a revolver was recovered by PW4 on 15 August 1981 from the place in which PW5 hid that revolver;

(2) upon discovery of the revolver, PW5 informed PW4 that that revolver was the same revolver given to him by the 1st appellant to keep; and that revolver was handed to him by the 1st appellant to keep;

(3) PW5 was an old friend of the 1st appellant and that revolver was handed to him by the 1st appellant "pada 4 hari raya puasa 1981" i.e. the early part of August 1981;

(4) upon recovery of that revolver, PW4 noted the number imprinted in the revolver and its type;

(5) on 19 August 1981 PW4 handed that revolver to PW9 to check for its serviceability and PW9 also took note of the number imprinted in the revolver and its type;

(6) PW5 in his evidence under oath confirmed that the 1st appellant handed him a revolver to keep "pada 4 hari raya puasa 1981" and also that he took PW4 to a certain place to recover that revolver;

(7) PW4 in his evidence identified P3 as the same revolver recovered from PW5 and he later handed that revolver to PW9 to check;

(8) finally PW9 identified P3 as the very revolver handed to him by PW4 for checking and his identification of P3 was made by his recognition of the No. 728327 imprinted in it and by the fact that it was a .38 revolver;

(9) in his confession, the 1st appellant admitted that the revolver which he used in the course of the robbery was a .38 revolver and after the robbery he kept it for some time but three months later he handed the same revolver to PW5 to keep and PW5 was an old friend of his.

The cumulative effect of the above factors can surely lead to one and only one conclusion - that the revolver which was subsequently tendered as an exhibit in the trial as P3 could not be any other revolver except the same one used by the 1st appellant in holding PW1 and PW2 in the course of the robbery.

It is therefore my considered opinion that even without the identification evidence of PW1 and PW2 regarding their identifying P3, the learned President could not, in the final analysis, have arrived at any conclusion except the guilt of the 1st appellant. The learned President's acceptance of the evidence of identification of P3 by PW1 and PW2, is nothing more than an exercise *ex abundanti cautela.*

Before proceeding to consider the grounds of appeal of the 2nd, 3rd and 4th appellants, there is one final point in the appeal of the 1st appellant which I must consider and dispose of lest it be thought that I have overlooked this point, notwithstanding that it was not argued at the hearing of the appeal before me. The point I am referring to relates to the seemingly failure on the part of the learned President to direct his mind to the fact that as PW5 was convicted of the offence of possession of a firearm namely P3, he should have stated in his grounds of judgment that he had cautioned himself of the danger of accepting the evidence of PW5, when it was possible that PW5 in testifying might not be telling the whole truth and nothing but the truth considering that PW5 was a person of unsavoury character. Although I have no doubt that PW5 cannot be classified as an accomplice in respect of the offence with which the 1st appellant was charged nevertheless prudence advises one to view his evidence with some care. Upon my scrunity of the notes of evidence I did take note of the following 2 statements recorded at p. 37 of the record of appeal by the learned President which read:

> Court notes the witness is a convict brought by prison warder

and

> Court: Saya sekarang menjalani hukuman penjara mengenai pistol ini.

No doubt the second statement was an answer given by PW5 to a question put to him by the learned President. In such a situation, I am satisfied that the learned President had directed his mind to the danger of accepting the evidence of PW5 without a careful examination.

In the ultimate analysis I am satisfied that the decision of the learned President in convicting the 1st appellant is neither improper nor wrong in law and there is no reason for me to disturb his finding. I therefore uphold the conviction. As regards to the question of sentencing the only sentence that the Court can impose for an offence under section 4 of the Firearms (Increased Penalties) Act 1971 is life imprisonment with whipping of not less than 6 strokes of the rotan. In the consequence the learned President is also correct in imposing the sentence which he did.

Now I shall turn to consider the appeals of the 2nd, 3rd and 4th appellants. While the learned defence Counsel, Mr. Manjit Singh, representing the 2nd and 3rd appellants, in his submission, centred his attack on the weakness of the identification evidence which no doubt played an important part in implicating them as participants in the robbery, it is interesting to note that the learned defence Counsel, Mr. George John, representing the 4th appellant, submitted that the 4th appellant would rely only on ground (b) of his petition of appeal (see p. 17 of the record of appeal) which, to put it simply, demurs the legality of the charge and conviction of the 4th appellant for abetment of an offence created by section 4 of the Firearms (Increased Penalties) Act 1971 when an offence under that section could only be committed by the person who **himself** exhibited a firearm in the course of committing a scheduled offence or the offence of robbery and no other person even though that other person was an active participant in the commission of a scheduled offence or the offence of robbery. In this situation, the charge against the 4th appellant for an abetment of the offence created under the said s. 4 was, according to the learned Counsel, null and void *ab initio.* The learned defence Counsel for the 2nd and 3rd appellants also adopted this contention as part of the defence of was clients.

I think it is more convenient to deal first with the issue of identification of the 3 appellants by PW2. At a glance, from the grounds of judgment of the learned President, it would appear that he relied substantially on his observation of the demeanour and his beliefl in the honesty of PW2 to arrive at his conclusion that the identification of the 3 appellants by PW2 as participants of the robbery was proved. If that was so, clearly the learned President had misconceived the rule of law regarding the test that ought to be adopted in assessing identification evidence which test has been laid down without equivocation in *K.S. Roberts v. PP* [1970] 2 MLJ 137 at p. 137:

> Identification is a fact or circumstance which must be proved against an accused person before it can be relied upon and used against him. A fact or circumstance is held to be proved only when it fulfils the definition of the word "proved" given in section 3 of the Evidence Ordinance. The evidence of identification is as much subject to this definition as any other kind of evidence but in assessing the evidence of identification the trial Court does not apply the tests providqd in this section. It is true that an absolute certainty is not required but the Court has to test the evidence with prudence and accept it only when it is so highly probable that its truth can safely by accepted. The test excluded from its orbit blind faith of a true believer, because prudence and credulity do not go together.

From this judgment it is clear that a trial Judge should not accept identification evidence merely because he thought that the witness was honest and truthful for the simple reason that even if that witness was truthful and in the mind of the witness, he was satisfied that he had identified an accused, he might nevertheless have made a mistake. Before an

identification evidence can be accepted, the trial Judge should subject it to a common sense test by examining closely the circumstances in which the identification came to be made. In *R. v. Turnbull* [1976] 3 All ER 549 at p. 552 Lord Widgery suggested the following questions that a trial Judge should ask himself in testing the strength or weakness of an identification evidence:

> How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual a apprance?

Lord Widgery then went on to point out that if the identification evidence was weak nevertheless a conviction could be sustained if there was some other evidence which went to support the correctness of the identification. Thus his Lordship said at p. 553:

> When, in the judgment of the trial Judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The Judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification.

The evidence necessary to support an identification evidence need not strictly be evidence that must amount in law to corroboration of the identification. So long as the evidence lends some support to the identification of the accused, it can be taken into consideration; the weight to be given to such evidence must necessarily depend on the facts of each individual case - see *R. v. Long* [1974] 57 Criminal Appeal Reports 871 @ 879.

Following the judicial propositions set out in the aforesaid authorities, I shall have to consider whether the learned President had applied the correct test in accepting the identification evidence of PW2. After a careful scrutiny of the record of appeal I am satisfied that the learned President did not rely only on the demeanour and creditworthiness of PW2 in accepting her identification evidence. His reasons for accepting her evidence appear at pp. 72 and 73 of the record of appeal. it is clear from the grounds of judgment that the learned President had taken into consideration all the circumstances in which the identification of the 3 appellants by PW2 came to be made. The matters which the learned President took into consideration included the length of time which the 3 appellants spent in ransacking the house thereby giving a good opportunity for PW2 to identify them; the reckless flashings of the torchlights by the 3 appellants in the small room where PW2 was under guard thereby enabling her to have a good look at their faces and physical features; and in the course of the robbery the 3 appellants had occasioned to approach the lst appellant who was standing close to PW2 thereby giving PW2 an opportunity to have a close view of their faces and physical features. Furthermore the learned President had also directed his mind to the fact that PW2 was able to give a detailed account of the part played by each and every one of the 3 appellants. For instance she said that she saw the 4th appellant went, into the kitchen and had the audacity to open a tin of cream crackers and eat some of the crearn crackers. She also was able to identify the 2nd appellant because on one occasion in the course of the robbery he came as near as six feet from where she was sitting. PW2's evidence of identification was further strengthened by her statement that she met the 2nd and the 3rd

appellants a week or two prior to the incident on a few occasions. As regards to the 4th appellant, she was able to recognise him because he visited her neighbour's house a number of times. All these factors clearly show that she had a good opportunity as well as sufficient light, and sufficient time to make a correct identification of all the 3 appellants. There was also no doubt that the learned President had taken into consideration that there was no evidence to show that there was any impairment in the power of observation of PW2. As regards to the inability of PW1 to identify any of the appellants, the reason he gave was that he had never met any one of them before and as the identification parade was held some 4 months after the robbery, it is not unnatural that he would not be able to identify any of them.

On the issue of the identification evidence the learned Counsel for the 2nd and 3rd appellants, in his submission, went on to point out certain discrepancies in the evidence of PW2. At the identification parades conducted by the police some 4 months after the incident, that is to say on 21 August 1981 and 6 September 1981 respectively, PW2 said she identified the 4th appellant at the first identification parade and the 2nd and 3rd appellants at the second parade when in fact according to PW12 who organised the identification parades, she identified the 2nd appellant at the first identification parade and the 3rd and 4th appellants at the second parade. The learned Counsel also emphasised the fact the PW2 persisted in saying that it was the 2nd appellant who threatened to burn down the house while her husband said in his evidence that "they" and not only the 2nd appellant threatened to burm down the house. Another discrepancy referred to by the learned Counsel related to the inconsistent descriptions of the physical features of the 3 appellants. While PW2 described the 2nd appellant as young, small-built and with fine voice, PW1 on the other hand described all the appellants as "orang tinggi dan badan sedap". With due respect, I do not think the so-called discrepancies are really serious or material contradictions when viewed in the light of the totality of evidence in thig case. The differences could be attributed mainly to differences in interpretation and differences in recollection. In any case even if I accept the contention of the learned Counsel it merely goes to the credibility of PW1 and PW2 and I am not in a position to refute the finding of the learned President on this point since he had the advantage of a personal assessment of the credibility of PW1 and PW2 after having seen and heard them testifying at the trial. At any rate, to say that because there was one or two inaccuracies in the evidence of PW2, one must reject the whole of her evidence, is contrary to the rule laid down in *Khoo Chye Hin v. PP* [1961] MLJ 105 @ 106.

In the ultimate analysis I see no reason for me to disturb the finding of the learned President regarding the identification of the 3 appellants by PW2.

In addition to the identification evidence, the 3rd and 4th appellants also each made a cautioned statement which in effect is a confession. Both of them described the planning of the robbery and the manner in which the robbery was carried out and their participation therein. When the prosecution attempted to tender their cautioned statements as prosecution exhibits both of them strenuously objected against the admissibility of their respective statements on the common ground that the statements were made under duress. The learned President therefore directed a trial-within-a trial to be held in order to satisfy himself that each of the appellants did in fact make his statements voluntarily. From the record of appeal I cannot see any mistake in the manner in which the mini trials were held; neither can I see any misdirection on point of law in the learned President's finding that the statements made by the 3rd and 4th appellants respectively were made voluntarily. In arriving at my conclusion I note that both the appellants' allegations of the acts of police brutality that was purported to have been done to compel each of them to make his statement comprised of mere bald

assertions. Such bald assertions as I have stated earlier without more cannot be accepted as true - see *Hem Raj v. State of Amjer (supra).* The more telling point which goes against their allegations that their statements were made under duress lies in their assertions that the contents of their statements were dictated by the police and they signed the statements in a robot-like manner and to avoid further police harassment. One needs only to examine the contents of the statement made by each of the 2 appellants which is enclosed at pp. 83 and 84 respectively of the record of appeal and be convinced that their assertions could not be true because certain facts which they stated in their statements could not be known by the police or even the 1st and 2nd appellants: those facts narrated therein could only be within the personal knowledge of the maker thereof and no one else. In any event the police witnesses testified that at no time did they carry out the brutal acts as alleged by the 3rd and 4th appellants and the evidence of the police witnesses was not controverted. In the circumstances I can find no reason to interfere with the finding of the learned President that the respective cautioned statements made by the 2 appellants were voluntarily made and they were properly admitted as the exhibits of the prosecution and formed part of the evidence of the prosecution. The consequece of this evidence is obviously detrimental to the defence put up by the 2nd, 3rd and 4th appellants since the cautioned statements were confessions made by the 3rd and 4th appellants regarding their complicities in the robbery. The confession also implicated the participation of the 2nd appellant in the robbery. It is important to note that in their confessions the 3rd and 4th appellants did not make any attempt to magnify or to cast blame on any one of the participants in the robbery in order to extricate themselves; neither did their confessions contain any self-exculpatory matter which would negative their own guilt. The learned President had given full weight to the confessions and I agree with his view. It follows therefore that their confessions could be taken into consideration pursuant to s. 30 of the Evidence Act 1950 not only to corroborate each other but also to lend weight to the identification evidence of PW2 - see *Herchun Singh & Ors.* v. *PP (supra)*. Likewise their confessions are also corroborative of the identification evidence of PW2 to establish the guilt of the 2nd appellant pursuant to s. 133 of the Evidence Act 1950.

Notwithstanding the aforesaid discussions, the matter does not end here in view of the important ground raised in the petitions of appeal of the 2nd, 3rd and 4th appellants alleging that the charge against these appellants for abetting the exhibition of the revolver is wrong in law since the only person who could be charged and convicted for the commission of the offence under s. 4 of the Firearms (Increased Penalties) Act 1971 is the person who, in the course of committing a scheduled offence or the offence of robbery actually exhibited a firearm. The learned defence Counsel representing the 4th appellant in the first part of his submission relied solely on this ground to urge me to reverse the conviction. In the second part of his submission, he further argued that since no evidence was led to show that the 4th appellant abetted the 1st appellant in his exhibiting the firearm in the course of the robbery, the prosecution had failed to make out a case against the 4th appellant and he should be acquitted and discharged at the close of the case for the prosecution. In short the learned President was wrong in calling upon him to enter on his defence. The learned defence Counsel representing the 2nd and 3rd appellants, adopted these contentions as part of their appeals. I must say that I was at one stage very much attracted and inclined to agree with the first contention of the learned defence Counsel as I thought that the language used in the said s. 4 seemed to support such a contention. There is no doubt that that section created an offence of exhibition of a firearm by any person in the course of the commission or abetting in the commission or attempting to participate in the commission of a scheduled offence or the offence of robbery and that section also says that that person who exhibited the firearm in those circumstances would suffer the punishment specified

therein. However upon a closer scrutiny of the provisions of s. 40 read with s. 109 of the Penal Code and the provisions of section 4 of the Firearms (Increased Penalties) Act 1971 it is my considered opinion that the contention of the learned defence Counsel is with due respect without merit for the following reasons.

In the first place s. 109 of the Penal Code has created a distinct offence namely the offence of abetment of an act or thing which is made punishable under the Penal Code. In the second place s. 40 of the Penal Code extended that distinct offence of abetment to include the abetting of any act or thing which is made punishable under any other law for the time being in force. Reading s. 40 with s. 109 of the Penal Code it is to my mind quite clear that the distinct offence of abetment under s. 109 has been extended to include any act or thing which is recognised as an offence and made punishable whether under the Penal Code or any other law. In the third place the act of exhibiting a firearm by a person in the commission or attempting to commit or abetting the commission of a scheduled offence or robbery is recognised as an offence and made punishable under s. 4 of the Firearms (Increased Penalties) Act 1971. In the consequence it is not wrong in law to call in aid s. 109 of the Penal Code to charge a person for abetment of an offence under s. 4 of the Firearms (Increased Penalties) Act 1971 by virtue of the extension of the distinct offence of abetment brought about by s. 40 of the Penal Code. Putting it another way it is not wrong in law to charge and convict a person for abetment under s. 109 of the said Code when it has been sufficiently proved that that person did abet another person in the exhibiting of a firearm by that other person in contravention of s. 4 of the Firearms (Increased Penalties) Act 1971 which contravention is an offence and made punishable under the said s. 4.

Coming back to the contention of the learned defence Counsel of the 4th appellant there is no doubt that the first part of his submission is based solely on the constructing of the following words appearing in s. 4 of the Firearms (Increased Penalties) Act 1971:

> **Any person who** at the time of **his** committing ... a scheduled offence or robbery, exhibits a firearm in a manner likely to put any person in fear of death or hurt **shall be punished** with imprisonment for life and with whipping with not less than six strokes.

Because of the underscored words, he submitted that no one else apart from the person exhibiting the firearm in contravention of the said section 4 could be charged and convicted under the said s. 4.

In support of his contention the learned defence Counsel for the 4th appellant relied on the authority of *Tan Chee Man v. PP* [1977] 2 MLJ 247. It is to be noted that in that case the first question before the Federal Court was whether s. 34 of the Penal Code could be invoked to punish a person other than the one who exhibited the firearm under s. 4 of the Firearms (Increased Penalties) Act 1971. In answer to the question in the negative the Federal Court pointed out that in view of the language used in the said s. 4, the provisions of s. 34 of the Penal Code could not apply to punish an accomplice who participated in a scheduled offence if he did not exhibit a revolver. The Federal Court had not elaborated further regarding the rationale behind the answer to that question but I think I am right in saying that the Federal Court might have in mind the following reasons. In the first place the provisions of s. 34, unlike the provisions of s. 109 of the Penal Code, are confined to acts or ornissions which are made punishable only under the said Code pursuant to s. 2 or to any "thing" which under the first paragraph of s. 40 is recognised as an offence under the said Code. Consequently the provisions of s. 34 cannot be imported to charge and convict an accomplice for an offence created by s. 4 of the Firearms (Increased Penalties) Act 1971 when such accomplice did not exhibit a firearm. In the second place and more importantly, s. 34 is only

a rule of evidence and it does not create a substantive offence. It simply means that if two or more persons intentionally do a thing jointly, it is just the same **as if each of them had done it individually**. Section 34 is therefore intended to meet a case where members of a party acted in furtherance of a common intention of all but it was difficult to prove exactly the part played by each of them. Such being the scope of s. 34, it is obviously impossible to utilise the provisions of that section to impute the commission of the offence created under s. 4 of the Firearms (Increased Penalties) Act 1971 to an accomplice who, though acting in furtherance of a common intention with the principal to commit a scheduled offence did not himself exhibit a firearm since the said s. 4 has no provision to cast vicarious criminal liability on such an accomplice. In this connection it is to be noted that s. 3A of the said Act has embodied provisions similar to s. 34 of the Penal Code in order to extend the punishment of the offence created thereby to accomplices. In the absence of such provisions in s. 4 of the said Act it is clear that the legislature did not intend to impute the commission of the offence created by it to an accomplice.

The second question in the *Tan Chee Man* case *(supra)* is whether a conviction of the co-accused who was unarmed on a charge under ss. 392 and 397 of the Penal Code could be sustained. Again the Federal Court gave a negative answer to the question as it was of the view that s. 397 did not constitute a separate offence in itself but merely provided for an additional punishment for the person or persons who at the time of committing or attempting to commit robbery, were armed with or used deadly weapons or caused grievous hurt or attempted to cause death or grievous hurt. But in the present case the charge against the 2nd, 3rd and 4th appellants was for abetment of the 1st appellant in the commission of the offence of exhibiting the revolver, P3, in the course of the robbery

No doubt the Firearms (Increased Penalties) Act 1971 has not provided for the punishment of abetment of the offence under s. 4 of that Act nevertheless by virtue of s. 40 of the Penal Code which extended the scope of s. 109 of that Code to include abetment of an offence made punishable by any other law, the said s. 109 therefore can be called in aid to charge the 3 appellants for the abetment of an offence under s. 4. A case in point is *Sesha Aiyar v. Venkatasubba Chetty* [1924] AIR Madras 487. In that case the 2nd and 5th accused were charged with the abetment of an election offence i.e. an application for a second voting paper by a person who had voted once at the same election which offence was created under the Madras Act V 1920. It was *inter alia* argued by the defence Counsel that as the Madras Act V 1920 made no provision for the abetment of election offences it was not permissible to borrow the provisions of section 109 of the Indian Penal Code which are in *pari materia* with the same section in our Code, to punish the accused. In rejecting the argument, the Madras High Court said at p. 488,

> ... and "offence" in s. 109 *(inter alia)* now denotes a thing punishable under the Code, of any special or local law. There is no doubt that Madras Act V of 1920 is a local law and it, therefore, seems clear that section 109 can be applied to a thing punishable under it. As pointed out, abetment is a separate and distinct offence, provided the thing abetted is an offence; and the thing abetted here is made an offence by the second paragraph to s. 40, Indian Penal Code.

Even had the offence of abetment been provided under the Firearms (Increased Penalties) Act 1971, nevertheless a charge for abetment of the commission of the offence under the said s. 4 by a person abetted can still be made pursuant to the provisions of s. 109 of the Penal Code. I find support for this proposition in *PP v. Mirza Khan* [1947] 13 MLJ 49. In that case the accused, a member of the Armed Forces within the meaning of the exception

in the definition of "person" in s. 2 of the Public Order and Safety Proclamation, was charged *inter alia* with having abetted the act of carrying arms committed by a detective in the Police Force, the charge being laid under s. 109 of the Penal Code and s. 3(1) of the Public Order and Safety Proclamation. A preliminary objection was raised to the charge upon two grounds. But for purpose of this appeal we need only to take into consideration the arguments regarding the first ground. It was argued that s. 6 of the Proclamation, having provided for abetment of offences under the Proclamation, no other statutory provisions could be used to charge a person for abetment and as the said s. 6 did not apply to members of the Forces the accused could not be held liable for abetment of an offence committed by the person abetted under the Proclamation. Spenser Wilkinson J rejected the first ground saying that there was no inconsistency between the provisions of s. 6 of the Proclamation and s. 109 of the Penal Code and that it was quite common in criminal law to find that an act or omission was punishable in different ways under different provisions of the law; hence the provisions of s. 6 of the Proclamation and the provisions relating to abetment in the Penal Code could subsist side by side. In the result a member of the Forces although not himself liable for abetment under s. 6 of the Proclamation might still be liable for abetment or an attempt under the Penal Code subject, however, to s. 108 of the said Code.

From the two authorities cited above, and for the purpose of this appeal, the requisites for the operation of s. 109 of the Penal Code may be surnmarised thus: (i) the prohibited act abetted must amount to an offence either under the Penal Code or some other law; (ii) it does not matter whether the statute creating the offence has or has not provided for an offence of abetment; in either case s. 109 of the Penal Code may still be imported to charge the abettor for the abetment of that statutory offence; and (iii) the offence abetted is committed as a consequence of the abetment; and (iv) if there are no express provisions under the Penal Code for the punishment of such abetment the punishment to be imposed for such abetment is to be the same punishment as provided for the commission of the statutory offence. From the above discussions, I am of the view that it is not wrong in law to charge the 2nd, 3rd and 4th appellants with the offence of abetting the 1st appellant in the exhibiting of the revolver in the course of the robbery and they could be legally convicted for the offence of abetment and punished with the same punishment as provided in s. 4 of the Firearms (Increased Penalties) Act 1971 provided it could be proved that the offence abetted was committed as a consequence of the abetment. At any rate it cannot be said that an accomplice who participated in a robbery could not in any circumstances abet the principal who exhibited the firearm in the course of the robbery under s. 4 of the Firearms (Increased Penalties) Act 1971. For example, two or more persons might have conspired to rob a house and prior to or in the course of the robbery the accomplice or accomplices might have instigated, conspired or intentionally aided their leader to exhibit a firearm to quell any resistance that might be put up by the victim.

The second part of the submission of the learned defence Counsel incidentally involving abetment was whether there was any evidence to establish that the 2nd, 3rd and 4th appellants did abet the exhibiting of the revolver by the 1st appellant. To determine the issue it is necessary to consider the ingredients essential to establish abetment. Section 107 of the Penal Code gives a definition of "abetment". From that definition it can briefly be said that abetment is constituted (i) by instigating a person to commit an offence; or (ii) by engaging in a conspiracy to commit an offence; or (iii) by intentionally aiding a person to commit an offence; or (iii) by intentionally aiding a person to commit an offence. There was no evidence in the present appeals of any instigation by the 2nd, 3rd or 4th appellants to cause the 1st appellant to exhibit the revolver in the commission of the robbery nor of any conspiracy between any

one of the 3 appellants and the 1st appellant **regarding the exhibiting of the revolver**. If at all abetment could be fastened on the other 3 appellants, it would be under the aforesaid (iii) constituent of abetment namely by intentionally aiding the 1st appellant to commit the offence. As the (iii) constituent of abetment stated above is an abridgement of the third clause of s. 107 of the Penal Code, it is useful to set out the exact wordings of that third clause which read as follows:

> A person abets the doing of a thing who:
>
> First ...
>
> Secondly ...
>
> Thirdly - Intentionally aids, by any act or illegal omission, the doing of that thing.

An act or illegal omission can be construed as an abetment if and only if the said act was carried out or the omission was brought about with an intention to aid the person to commit the offence abetted. The intentional aid may comprise of (i) either doing of an act, directly assisting the commission of the crime abetted of (ii) doing of an act which, though not directly assisting its commission, **affords facilities** for its commission; or (iii) it may not be an act at all, but an illegal omission resulting in the same consequences. In the instant appeal it must be borne in mind that the charge of abetment against the 3 appellants was not in respect of the commission of the robbery but in respect of the commission of an offence under s. 4 of the Firearms (Increased Penalties) Act 1971 namely exhibition of a firearm by the lst appellant in the course of carrying out the robbery. The learned President did not direct his mind at all as to whether there was any evidence to establish that any one of the 3 appellants did any overt act which directly or by reasonable inference assisted or afforded facilities to the 1st appellant in committing the offence of exhibiting the revolver. Be that as it may, my perusal of the record of appeal shows that there is no sufficient evidence to support the fact that any of the 3 appellants did any overt act with the intention to assist or afford any facilities directly or indirectly to the 1st appellant in his commission of the offence of exhibiting the revolver in contravention of s. 4 of the Firearms (Increased Penalties) Act 1971. Likewise the learned President faded to consider whether any of the 3 appellants by an illegal omission intentionally assisted or intentionally afforded facilities for the exhibition of the revolver by the 1st appellant. This issue of an illegal omission which might amount to an abetment was dealt with by the late Sharma J and his answer to the issue was clearly set out in his judgment in *Chuan Keat Chan Ltd. & Anor. v. PP* [1972] 2 MLJ 57 at p. 58:

> In order however to constitute an offence of abetment by omission, the omission must be an illegal one. In other words, **there must be a duty to act**. The words "illegal omission" in the third clause of section 107 have reference to an intention of aiding the doing of the thing.

(Emphasis supplied)

The words in bold are important in that the mere fact that a person has failed to take steps to prevent or to inform the police of the commission of an offence by another person cannot by itself fasten abetment on the first mentioned person unless perhaps such failure falls within the scope of s. 13 of the Criminal Procedure Code and in the present appeal the failure to prevent or to inform the police of the commission or intention of the 1st appellant to commit, an offence under s. 4 of the Firearms (Increased Penalties) Act 1971 does not fall with the scope of the said s. 13. The evidence must therefore go further to establish that the purported abettor has a duty or obligation enjoined by law to prevent the commission of the offence. An illustration of the principle can be found in the case of *Rupdivi v. State of HP* [1955] AIR HP 15. In this case the wife of the deceased had an illegal connection with the accused.

Although the wife knew that the accused was waiting to ambush and murder her husband on a particular day she did not warn her husband but let him go to his doom. Her act no doubt is open to moral censure nevertheless it would not amount to an abetment of the murder of her husband by the accused.

Coming back to the present appeal the most that can be said against the 3 appellants was that they might have knowledge that the 1st appellant had a revolver with him and even then they acquired the knowledge on whilst they were on their way to the house which they intended to rob.

In the circumstances, it cannot be said that any one of the 3 appellants did intentionally aid the 1st appellant to exhibit the said revolver because mere knowledge by itself without more cannot constitute the subsequent exhibition of the revolver by the 1st appellant. Evidence of abetment of the offence of robbery there is but evidence of the abetment of exhibiting the firearms thereby contravening s. 4 of the Firearms (Increased Penalties) Act 1971 there is none. In the result the learned President had erred in law and in fact in convicting the 3 appellants for the offence which they were charged.

The final ground of appeal of the 3 appellants concerns their defence of alibi. The learned defence Counsel submitted that the learned President had failed to take into consideration the defence of alibi put up by the 3 appellants at the trial. I cannot accept the contention of the learned defence Counsel because in rejecting the defence of alibi the learned President had indeed taken into consideration their defence of alibi. On this point the learned President in his grounds of judgment said at p. 76 of the record of appeal:

> The 2nd accused gave his defence in three sentences i.e. he was arrested on 9 August 1981, he was in Pahang before that and he returned a month before his arrest.
>
> In cross-examination he said that he was staying for three years with his grandparents in Kg. Sena Pahang and at the time of robbery he was in Pahang.

Then further down in his grounds of judgment the learned President said:

> His defence was an alibi defence. I rejected it for non-compliance with s. 402A of the Criminal Procedure Code.
>
> In view of the seriousness of the charge and the absence of counselling I did not dismiss or reject his defence for nonc-ompliance.

The learned President then went on to assess his defence of alibi in the light of the totality of the evidence in this case. In respect of the 3rd and 4th appellants the learned President had also taken into account their common defence of alibi. But he rejected their defence on the ground that in the circumstances of the case and the evidence as adduced, such a defence was not probable. In any event the failure to give notice under s. 402A of the Criminal Procedure Code to indicate that the 3 appellants would be relying on the common defence of alibi at the trial was fatal and the evidence relating to the defence of alibi could not be taken into consideration. In making this proposition I am relying on the case of *PP v. Lim Chen Len* [1981] 2 MLJ 41 @ 42-43.

The final matter which I have to consider is what step should this Court take in view of the aforesaid findings made by me. In his submission, the learned Counsel for the 4th appellant conceded that I could amend the charge to one for the commission of offence under s. 9 of the Firearms (increased Penalties) Act 1971. That section created an offence of consorting with or being in the company of another person who is in unlawful possession of a firearm.

However the learned Defence Counsel contended that in the circumstances of this case an amendment of the charge would cause injustice to the 4th appellant in that he would be deprived of the opportunity to establish that he had no knowledge that the 1st appellant was in unlawful possession of the revolver.

The learned DPP, however, submitted that even if s. 109 of the Penal Code could not be called in aid to sustain the charge against the 3 appellants with abetment there was however sufficient evidence to charge the 3 appellants for offence under s. 9 of the Firiarms (Increased Penalties) Act 1971. I cannot accept the submissions of the learned Counsel and the learned DPP regarding the right of this Court in dealing with an appeal to amend the original charge with which the 3 appellants were tried. In *Yong Hock Pin v. P.P.* [1977] 1 MLJ 178 Ali Ag. CJ (as he then was) said quite unequivocally:

> We do not think it was competent for the learned Judge on appeal to amend the charge.

Be that as it may, it is quite clear that the High Court in exercising its appellate jurisdiction is empowered under s. 316(b) of the Criminal Procedure Code to alter a finding and to substitute a conviction for a different offence. But in hearing an appeal from a conviction this power must be exercised subject to the provisions of ss. 166 and 167 of the Criminal Procedure Code, Thus *in Sivalingam v. PP* [1982] 2 MLJ 172, the Federal Court laid down this proposition. It was further stated in the judgment that to warrant a substitution there must be clear evidence that a case for the substituted offence would have been made out or established in the Court below. The Federal Court cited with approval the following passage from the judgment of Cussen J in *Ng Ee v. PP* [1941] MLJ 180:

> The power of substitution of a conviction under a different provision of the law for the conviction found by the Magistrate is to be exercised with great caution, and only where it is clear beyond all doubt, from the nature of the offence and the record of evidence in the case, that to do so can in no way prejudice the case of the accused. It must be clear that if the substituted charge had in fact been the original charge the proceedings at the trial would have taken the same course, the evidence recorded been the same - that the prosecution evidence would have been unchanged (substantially) and the accused's evidence the same.

In *Lew Cheok Hin v. Reg.* [1956] MLJ 131 @ 134 Taylor J summarised the tests which should be applied before an appellate Court could exercise the power to alter a conviction in this way:

> There are two main tests. First, the facts must be such that the unframed charge was available from the start and could have been framed and tried concurrently under s. 165; secondly, the evidence must have been presented in such a way as to raise all the same issues of fact as would have been raised had the unframed charge been framed and trial claimed on it. Not only must the evidence for the prosecution be the same but the Court must be satisfied that the evidence for the defence would also have been the same.

Applying the aforesaid tests to the instant appeal before me it is clear that the facts of the case against the 2nd, 3rd and 4th appellants were of such a nature that each of the 3 appellants could have had been separately charged for the commission of the offence of robbery under the second limb of s. 392 of the Penal Code without even the necessity to call in aid s. 109 of that Code to sustain the charge. Had they been so charged for robbery there would be no statutory inhibition to a joint trial of all the 4 appellants either under s. 165 or s. 170 of the Criminal Procedure Code. As to the evidence adduced at the trial in the lower Court, it is beyond dispute that the evidence of the prosecution was presented in such a way as to leave no room for argument that the evidence was directed towards proving

that the 3 appellants committed the offence of robbery. On the other hand the evidence of the defence was nothing more than to establish a defence of alibi. Indeed even upon a cursory reading of the grounds of judgment of the learned President it is clear that he convicted the 3 appellants simply because of their active participation in the robbery and not so much on any other ground. Hence each of the 3 appellants could have been charged for robbery under the second limb of s. 392 of the Penal Code and had they been so charged. the conduct of the proceedings adopted and the evidence adduced by both the prosecution and the defience respectively could not have been in any way different from the manner in which the conduct of the proceedings and the presentation of the evidence were carried out by all parties at the original trial at the Sessions Court. Putting it another way, had the 2nd, 3rd and 4th appellants been originally charged for robbery at the Sessions Court the presentation of the case for the prosecution and the case for the defence would have taken the same course and hence the 3 appellants could in no way be prejudiced.

In the circumstances I alter the convictions imposed by the learned President against the 2nd, 3rd and 4th appellants and substitute a conviction of the commission of an offence of robbery under the second limb of s. 392 of the Penal Code in respect of the 2nd, 3rd and 4th appellants.

As regards to sentence I must take into consideration that robbery is very rampant and it is in the public interest that the sentencing of the 2nd, 3rd and 4th appellants must not only reflect the public abhorrence of the robbery but the sentence must also be sufficient to deter other persons from trying to commit or even thinking of committing such heinous offence. I therefore impose on each of the 2nd, 3rd and 4th appellants a substituted sentence of 12 years' imprisonment effective from the date of arrest. In addition the 2nd and 4th appellants shall receive six strokes of the rotan.

As the 3rd appellant was over 50 years of age at the date of the trial he should not be made to suffer the sentence of whipping pursuant to s. 286 of the Criminal Procedure Code, and I so hold.

Also found at [1987] 2 CLJ 207